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REPLY BRIEF OF PETITIONER

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No. 184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,

Petitioner,

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, AND 22,081 STOCKHOLDERS OF THE UNITED CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

M. QUINN SHAUGHNESSY,
715 Cafritz Building,
Washington 6, D. C.

JOHN MULFORD,
THOMAS BEATH,
HENRY S. DRINKER,
117 South 17th Street,
Philadelphia 3, Pa.

Counsel for Petitioner.

AUGUST 24, 1953

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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The General Protective Committee for the Holders of Option Warrants of The United Corporation,
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v.

The Securities and Exchange Commission, The United Corporation, Edward R. Downing, Randolph Phillips, and 22,081 Stockholders of The United Corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF OF PETITIONER.

ADDITIONAL STATUTES INVOLVED.

The Public Utility Holding Company Act of 1935:

"Sec. 2(a) When used in this title, unless the context otherwise requires—

"(1) 'Person' means an individual or company.

* * * * * * *

"(12) 'Registered holding company' means a person whose registration is in effect under section 5."

ARGUMENT.

There are, in effect, three respondents to the petition for a writ of certiorari in this case: certain stockholders of The United Corporation ("United"), United itself, and the Securities and Exchange Commission (the "Commission").

The stockholders of United filed no brief in opposition to the petition. United filed a short brief which does not attempt to answer the petition, but formally opposes it only on the ground that there is some evidence in the record that the warrants are worthless and hence that their forfeiture is fair and equitable. The Commission also opposes it partially on the ground that the forfeiture of the warrants is fair.

Petitioner, for many reasons, a few of which are referred to at pages 4 and 5 of the petition, earnestly contends that the forfeiture of the warrants is unfair to the warrantholders. Particularly, petitioner denies the statement (Commission's brief, p. 8) that to permit the warrants to remain outstanding is to give the warrantholders "compensation at the expense of the common stockholders."[1] To permit the warrants to remain out-

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[1] The Commission here is apparently quoting from the opinion of this Court in *Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336 (1951). In that case an issuer of perpetual warrants was to be dissolved and the common stock of its successor was to be issued to its stockholders. The question was whether the successor should pay cash to the warrantholders or receive from the predecessor cash diminished by such a payment. This Court, in upholding the forfeiture of the warrants, stated at pages 346-7:

> "(The existence of a market value for the warrants) does not provide an adequate reason for allowing a value to the warrants, at the expense of the common stock, in a reorganization under this Act. * * * The cash allowance (which the Commission) gives to one security it must take from another."

The same decision, made on facts identical in these respects in *In re Commonwealth & Southern Corp.*, 184 F. (2d) 81 (C.A. 3 1950) cert. denied, 340 U. S. 929 (1951), is also to be distinguished on this as well as other grounds.

standing gives the warrantholders nothing and takes nothing from the stockholders. It merely permits and requires both to keep exactly what they now have and no more. On the contrary, the forfeiture of the warrants would constitute a donation to the stockholders of the warrantholders' rights. In this case the common stock is to remain unchanged and all that petitioner seeks is that the warrants be treated the same way. To permit the warrants to remain outstanding cannot possibly be unfair to the stockholders. If the warrants should hereafter be of value, the holders would merely be receiving the contract rights which the stockholders sold them (in a package with preference and common stock for cash and securities worth over $163,000,000 (R. 145-6). If they should never have any value, the stockholders would not be affected.

However, since the fairness of the forfeiture has no bearing whatever on any of the three reasons for granting the writ which appear in the petition, further discussion of it, or of the scanty evidence supporting it and the substantial evidence against it, appears inappropriate here.

I. The Jurisdiction of the Court Below.

The Commission, like the stockholders and United, practically confesses error on the first question presented by the petition, namely, whether the Court below had jurisdiction to review the feature of the plan forfeiting the warrants.

The Commission's first argument on this point is that petitioner is somehow estopped to raise the question because of statements in petitioner's reply to the arguments of the Commission and United opposing petitioner's application for leave to intervene. They argued that intervention was unnecessary because the Court below had no jurisdiction to pass on the forfeiture of the warrants. The only answer to this argument was that the Court might

hold it had jurisdiction, as it subsequently did. Petitioner's remarks were not addressed to the merits of the question of jurisdiction, but to the fact that it was doubtful and that petitioner should be granted the right to be heard in case the doubt should be resolved in favor of jurisdiction (as it was). There was no reason for petitioner to repeat in its brief the able arguments of the Commission against the jurisdiction of the Court below.

The only other argument of the Commission on this point is that, admitting that it was wrongly decided by the Court below and that it involves an important question and conflicts with decisions in other circuits, this Court should not consider the problem "at this time" (Commission's brief, pp. 14, 25). This is urged on the ground that a reversal of the Court below on this ground would simply enable petitioner to repeat before the enforcing district court, and perhaps later before a court of appeals or this Court on certiorari, the same arguments that petitioner addressed to the Court below. This argument is without merit. Even if petitioner should be held to be bound by the decision of the Court below, the holders of the 68% of the warrants who are not represented by petitioner, and who have no notice of this proceeding, are certainly not bound by that decision and can, and probably will, raise the same points before the district court asked to enforce the plan.

II. The Lack of an Essential Jurisdictional Finding.

The second reason for granting the writ advanced by petitioner is that the Commission failed to make the necessary jurisdictional finding that the warrants constituted a complexity in the structure of United's holding company system. The Commission argues that, from its finding that they complicate United's corporate structure, it necessarily follows that they were an undue complexity in its system. But a security may well be an "undue

complexity" in the structure of its issuer and be of trivial significance in the structure of the holding company system of which its issuer is only a part. The Congress did not ban mere *corporate* complexities. It specified *system* complexities. As the title, history, and text of the Act show, its sole purpose was to regulate holding company systems. Corporate structures are governed by state law.

The Commission, contrary to the statement at page 16 (footnote 8) of its brief, did *not* find in the instant case that United's corporate structure contravened Section 11(b)(2) "because of the inadequacy and inappropriatness of the underlying structure for the support and maintenance of (United's) security structure." The absence of such a finding (for which there is no basis in the record) and of any other finding as to the structure of United's holding company system is the vital defect in the Commission's case. Such a finding *was* made by the Commission in *Central & Southwest Utilities Co.* v. *S.E.C.*, 136F(2) 273 (C.A.D.C. 1943), cited by the Commission, where the Court said at page 275:

> "When earnings and assets of subsidiaries are not sufficient to provide for any of the stock of a holding company the considerable degree of security which the public attributes to preferred stock, it may reasonably be thought that division of the holding company's stock into preferred and common will 'unduly or unnecessarily complicate the structure' *of the system*" (emphasis supplied).

None of the other cases cited by the Commission has any bearing on the duty of the Commission to make express findings of essential jurisdictional facts. Nor do the references in Sections 1 and 7 of the Act to certain standards for the *issuance* of securities (even if the issuance of United's warrants violated them, which is denied)

have any bearing on whether a class of securities now outstanding should be allowed *to continue in existence.*[2]

III. The Refusal to Consider New Material Events.

The third reason given for granting the writ is that the Court below abused its discretion by failing to grant petitioner's motion for leave to adduce additional evidence in a case where the evidence, if heard, would make it impossible for the Commission or a court thereafter to find that the plan was "necessary", as required by Section 11(e) of the Act.

The Commission does not deny the conflict between the decision below and those in other Circuits. It merely argues first that, assuming the evidence to be true and United to be no longer a holding company, United is still a *registered holding company*, subject to Section 11(b)(2). But that Section provides that nothing in it "shall authorize the Commission to require any change in the corporate structure * * * of any company which is not a holding company". This provision does not refer to companies "which are not *registered* holding companies". A registered holding company is defined in Section 2(a)(12) of the Act as a *person* whose registration is in effect. A company does not have to be a holding company to qualify as a "person" or hence as a "registered holding company". Therefore, once the record is opened to show the new fact that United is not a holding company, the for-

[2] Of greater relevance are the standards of the Investment Company Act of 1940, Act of August 22, 1940, c. 686, Section 18(d) (54 Stat. 819) U. S. C. Title 15, Section 80a-18(d), also administered by the Commission and to which United will be subject on consummation of the Plan. In passing on other phases of the Plan the Commission considered and applied the standards prescribed in that act (R. 31). It provides "any warrant may be issued in exchange for outstanding warrants in connection with a plan of reorganization". The issuance of perpetual warrants similar to those of United has been approved by the Commission under this section. *Tri-Continental Corp.*, Investment Company Act of 1940 Release No. 1572 (1951).

feiture of the warrants will not only become no longer "necessary" under Section 11(b)(2), but will be prohibited by that Section.

The second argument of the Commission is that United has *perhaps* not ceased to be a holding company. The Commission has already decided, contrary to this argument, that upon the reduction of United's holdings to less than 10% of the stock of another former subsidiary, such subsidiary thereupon, without any action by the Commission, ceased to be a subsidiary of United (R. 451). That decision is consistent with Section 2(a)(7)(A) of the Act which defines a "holding company" as "any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding securities of a public utility company * * *". As the Commission does not deny, United does not today own as much as 10% of any such securities. Hence it cannot be a holding company. If further authority on this point is necessary, see *Protective Committee for Class A Stockholders of International Hydro-Electric System* v. *S.E.C.*, 184 Fed. 2d 646 (C.A. 2 1950), where the Court said at p. 647:

> "Although the New England Electric System is a holding company, yet, because the International Hydro-Electric System holds only eight per cent of its shares, it does not count in determining whether the International Hydro-Electric System is itself a holding company."

The Commission has not yet declared that United "has ceased to be a holding company" pursuant to Section 5(d) of the Act, in which event its registration would cease to be in effect. But the absence (to which petitioner had no possible grounds to object, contrary to the Commission's suggestion at page 20 of its brief) of an application for such declaration has no bearing on United's status as a "holding company" or merely a "company"

(as distinguished from a "registered holding company") under Section 11 of the Act. Such a declaration must necessarily be preceded by the event. It could not, as the quoted language from Section 5(d) shows, be simultaneous with or prior to the actual cessation of a company's status as a holding company.

CONCLUSION.

For the foregoing reasons and those contained in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

M. QUINN SHAUGHNESSY,
715 Cafritz Building,
Washington 6, D. C.

JOHN MULFORD,
THOMAS REATH,
HENRY S. DRINKER,
117 South 17th Street,
Philadelphia 3, Pa.
Counsel for Petitioner.

AUGUST 24, 1953.

BRIEF FOR THE PETITIONER.

SUPREME COURT, U.S.

FILED

NOV 9 1953

HAROLD B. WILLEY, Clerk

BRIEF ON MERITS

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HENRY S. DRINKER,
THOMAS RHEATH,
JOHN MULFORD,
117 South 17th Street,
Philadelphia 3, Pa.

M. QUINN SHAUGHNESSY,
715 Cafritz Building,
Washington 6, D. C.

Counsel for Petitioner.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings and opinion of the Securities and Exchange Commission (R. 1), Holding Company Act of 1935 Release No. 10614, are unreported. The opinion of the Court of Appeals (R. 403) is reported in 203 F. 2d 611.

JURISDICTION

The judgment of the Court of Appeals (R. 426) was entered on March 31, 1953. A petition for rehearing (R. 428), timely filed on April 13, 1953, was denied on April 22, 1953 (R. 446). The petition for a writ of certiorari was filed on July 16, 1953 and granted on October 12, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 15 U. S. C. § 79x(a).

QUESTION PRESENTED

Where an order of the Securities and Exchange Commission, approving a simplification plan under Section 11(e) of the Public Utility Holding Company Act of 1935 for the forfeiture of certain securities, is stated to be not operative until enforced by a district court under that section (which requires approval by such a court after notice and opportunity for hearing), may a holder of different securities, aggrieved only by other provisions of the commission order, obtain approval of such forfeiture by a court of appeals reviewing such order under Section 24(a) of that act, without approval by a district court or notice or opportunity for hearing?

STATUTE INVOLVED

Sections 11(e), 18(f), and 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 822, 832, 834, 15 U. S. C. §§ 79k(e), 79r(f), 79x(a)) provide:

> "Sec. 11 * * * (e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f)

of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

* * * * * * *

"Sec. 18. * * * (f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree of restraining order shall be granted without bond."

* * * * * * *

"Sec. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business,

or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failures so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code as amended (U. S. C., title 28, secs. 346 and 347)."

STATEMENT

The United Corporation (hereinafter called "United") is a registered holding company under the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79 *et seq.*, hereinafter called the "Act"). Its outstanding securities are 14,072,149.5 shares of common stock and perpetual warrants (R. 205) to purchase 3,732,059 additional such shares.

United filed with the Securities and Exchange Commission (hereinafter called the "Commission") a plan under Section 11(e) of the Act, providing, *inter alia*, for its continued existence as an investment company and for the cancellation of its warrants without compensation to warrant holders. The Commission on June 26, 1951 approved the plan, finding it, as required by that section, both (i) necessary to effectuate the provisions of Section 11(b) of the Act, and (ii) fair and equitable to the warrant holders (R. 80). The Commission's order provided that it "shall not be operative to authorize the consummation of the provisions of the plan * * * relating to the cancellation of United's option warrants * * * until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said provisions" (R. 80). No such application has been made.

Edward R. Downing and Randolph Phillips, stockholders of United, claiming to be aggrieved by other portions of the Commission's order (particularly its approval of United's continued existence as an investment company), filed in the Court below under Section 24(a) of the Act a petition to review the order. They asked the Court to approve and enforce the provision of the plan forfeiting the warrants. No notice of their petition was served on petitioner or the warrant holders (R. 243).

Petitioner, representing the holders of approximately 32% of the warrants, sought (R. 242), and was finally granted (R. 267, 426), leave to intervene. The Commission opposed petitioner's motion on the ground, *inter alia*, that only an enforcing district court had (and the Court below did not

have) jurisdiction over the provision of the plan forfeiting the warrants (R. 247).

Petitioner filed motions for leave to adduce evidence of events occurring subsequent to the order of the Commission but prior to the decision of the Court (R. 376, 448). This evidence, if admitted, would prove that the forfeiture of the warrants no longer meets the "necessity" requirement of Section 11(e) of the Act. The motions were denied by the Court without opinion (R. 400, 407, 426).

The Court, without considering the new events disclosed by petitioner's motions, affirmed (R. 427) the order of the Commission, holding that, contrary to the contentions of the Commission, it had jurisdiction to approve (though not to enforce) the forfeiture of the warrants, and that the Commission's findings with respect to the warrants were supported by substantial evidence (R. 403). Petitioner's petition for rehearing (R. 428) was denied without opinion (R. 446).

This Court granted the petition for a writ of certiorari "limited to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission" (R. 465).

SPECIFICATION OF ERROR

The Court of Appeals for the District of Columbia Circuit erred in holding that, although the order of the Commission, approving United's plan under Section 11(e) of the Act for the forfeiture of United's warrants, is stated to be not operative until enforced by a district court under that section (which requires approval by a district court after notice and opportunity for hearing), it had jurisdiction to approve such forfeiture, without approval by a district court or notice or opportunity for hearing, while reviewing under Section 24(a) of the Act other provisions of the Commission order on petition of stockholders of United not aggrieved by such forfeiture.

SUMMARY OF ARGUMENT

Voluntary plans under Section 11(e) of the Act, which force no one to surrender rights against his will, require no

court enforcement. They are reviewable by a court of appeals under Section 24(a) of the Act only on petition of persons aggrieved by them. The petitioning stockholders below would be benefited, not aggrieved, by the forfeiture of the warrants. They could not confer on the Court below jurisdiction to review such forfeiture by appealing from provisions of the Commission order approving other features of the plan.

Compulsory plans, forfeiting or changing security holders' rights regardless of their wishes, are not effective until enforced by a district court under Section 11(e), as the Court below held. They can be so enforced only after approval of the plan by a district court on application of the Commission and at the request of the company, after notice and opportunity for hearing at which all persons affected may offer new, material evidence. None of these safeguards for affected security holders is available in review proceedings under Section 24(a). The Court below did not require notice to be given to warrant holders and denied them an opportunity for hearing.

Three other courts of appeals have held compulsory plans not reviewable under Section 24(a). These decisions are sound, and are supported by the legislative history, by the long-continued construction of the Act by the Commission, and by the rule that only final orders are appealable.

The "exclusive jurisdiction" given by Section 24(a) to the court of appeals where the transcript of the record before the Commission is filed means exclusive jurisdiction over all petitions to review the same order, in whatever circuit filed. It does not give that court the right to usurp the function of an enforcing district court to review compulsory plans.

The Act permits compliance with Section 11 to be achieved in steps. Separate steps may be dealt with either in separate plans approved by separate Commission orders or as severable portions of a single plan. The compulsory features of United's plan either are severable or compel review of the entire plan only by an enforcing district court. They should be considered by only one court, not two as the decision below requires.

ARGUMENT

I. Voluntary Plans Require No Court Enforcement and Are Reviewable Under Section 24(a) of the Act.

There are two categories of plans filed by companies and approved by the Commission under Section 11(e) of the Act. The first may be termed "voluntary" plans which the parties to the proceeding can carry out themselves without the aid of court enforcement. Thus a company's plan may provide for a sale of its non-integrated properties or of non-retainable securities of its subsidiaries, for the distribution of such securities to its stockholders as a dividend, or for an offer to its security holders *at their option* to exchange their securities for cash or other securities. Under such plans no one is forced to surrender any rights against his will. Hence the compulsion of court enforcement proceedings is unnecessary. As the court said in *Commonwealth & Southern Corp.* v. *S.E.C.*, 134 F. 2d 747 (C. A. 3 1943):

> "If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed." (P. 751 of 134 F. 2d.)

It was such features of United's plan (for example, its continued existence as an investment company) by which the petitioning stockholders below claimed to be aggrieved. If so aggrieved they were entitled (unless prevented by the fact that United's plan also contained involuntary or compulsory features requiring district court enforcement—a point discussed in part IV of this brief) under Section 24(a) of the Act to appeal from the provisions of Commission's order approving of them, since the Commission had not applied to a district court to enforce the plan prior to the termination of the sixty day period allowed for such appeals by that section. But their appeal could not confer on the Court below jurisdiction over the compulsory features of the plan by which they would be benefited, not aggrieved.

II. Compulsory Plans Require Review and Enforcement by a District Court as a Court of Equity After Notice and Opportunity for Hearing at Which All Persons Affected May Offer Evidence.

The other category of Section 11(e) plans may be termed "compulsory" plans. In such plans the rights of security holders are affected regardless of their wishes. Their rights may be confiscated or forfeited, as the rights of the warrant holders would be under United's plan in this case, or their securities may be converted, by operation of the court order enforcing the plan, into different securities, as in the plan reviewed in *Otis & Co.* v. *S.E.C.*, 323 U. S. 624 (1945).

Congress provided an elaborate scheme of judicial review to protect security holders in such cases from an abuse of the vast powers granted to the Commission by what was in 1935 termed the "death sentence" in Section 11 of the Act. Section 11(e), after providing for Commission approval of such a plan, continues:

> "the Commission, at the request of the company, may apply to a (district) court * * * to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may * * * take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee * * * to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed." 49 Stat. 822, 15 U. S. C., § 79k(e).

Compulsory plans, as the Court below correctly decided (R. 417, 419), cannot be enforced by a court of appeals reviewing them under Section 24(a) and are not effective to forfeit or change the rights of security holders until they are

enforced by a district court (which is given *in rem* jurisdiction) in accordance with this specialized procedure. As this Court said in *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949):

> "the primary object of § 11(e) * * * was to enable the Commission, by giving it the authority to invoke the court's power, to mobilize the judicial authority in carrying out the policies of the Act. To do this the court '*as a court of equity*' was authorized to 'take exclusive jurisdiction and possession of' the company or companies and their assets and to appoint a trustee to hold and administer the assets under the court's direction." (P. 125 of 338 U. S.—emphasis supplied.)

The enforcement procedure specified by Congress has many safeguards for the security holders adversely affected. Only the Commission may bring an enforcing court's powers *as a court of equity*[1] into action. Neither the company nor any of its security holders may do so. Even the Commission cannot do so unless the company so requests.[1] Before a district court can enforce a plan notice must be given to all persons affected by it. All such persons, even though they did not appear before the Commission, have a right to a hearing before that court. *American & Foreign Power Co., Inc.*, 80 F. Supp. 514, 524 (S. D. Me. 1948); *In re United Light & Power Co.*, 51 F. Supp. 217, 220 (D. Del. 1943), affirmed *sub nom. In re Securities and Exchange Commission*, 142 F. 2d 411 (C. A. 3 1944), affirmed *sub nom. Otis & Co.* v. *S.E.C.*, 323 U. S. 624 (1945); *In re Niagara Hudson Power Corp.*, 86 F. Supp. 607, 609 (N. D. N. Y. 1949), reversed on other grounds *sub nom. S.E.C.* v. *Leventritt*, 179 F. 2d 615 (C. A. 2 1950), reversed *sub nom. Niagara Hudson Power Corp.* v. *Leventritt*, 340 U. S. 336 (1951); *In re Engineers Public*

[1] Section 11(e) of the bill as introduced and passed by the Senate (S. R. 2796 (1935)) did not make the Commission's power to apply for enforcement dependent on the request of the company, nor did it require the court taking jurisdiction of the company and its assets to do so as a court of equity. These provisions of the Act were inserted in conference between the managers of the House and Senate bills.

Service Co., 168 F. 2d 722, 731-2 (C. A. 3 1948), reversed on other grounds *sub nom. S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949).

If, at the hearing so required, material evidence is offered which could not have been produced before the Commission, the enforcing court must either consider the evidence or remand the case so that the Commission may consider it. *In re Interstate Power Co.*, 89 F. Supp. 68, 71-2 (D. Del. 1950); *In re Standard Gas & Electric Co.*, 63 F. Supp. 876, 878 (D. Del. 1945). See *In re Engineers Public Service Co.*, *supra*, at page 732 of 168 F. 2d; *In re Northern States Power Co.*, 80 F. Supp. 193, 200 (D. Minn. 1948); *In re Electric Bond & Share Co.*, 73 F. Supp. 426, 443 (S. D. N. Y. 1948); Davis, *Administrative Law* (1951), Section 178, pages 502-3.

In the first court enforcement proceeding brought under the Act the court pointed out:

> "It would seem that stockholders of a corporation involved in proceedings under Section 11(e) of the Act are in no different position from stockholders of corporations in reorganization under Section 77B or Chapter X. In each case the stockholders are afforded opportunity for hearing." *In re Community Power & Light Co.*, 33 F. Supp. 901, 916-17 (S. D. N. Y. 1940).

III. The Decisions in Other Circuits Denying Courts of Appeal Jurisdiction to Review Compulsory Plans Are Sound, and Are Supported by the Legislative History of the Act, by Its Long-Continued Administrative Interpretation, and by the Rule Prohibiting Appeals Except From Final Orders.

From the foregoing discussion it is clear that, in the two types of proceedings for judicial review of a Section 11(e) plan under the Act, although the scope of the review is the same (*S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949)), the procedure and the parties contemplated by the statutory scheme are wholly different.

None of the protective safeguards provided in Section 11(e) is afforded by Section 24(a). Thus United did

not request the review by the Court below nor did the Commission apply for it. United itself was not a respondent and had to obtain leave of the Court to intervene. The Court held that a stockholder of United, not aggrieved but benefited by the forfeiture of the warrants, could obtain the necessary court review and approval of the forfeiture and thus eliminate both the necessity for the enforcing district court's approval as a court of equity and that court's power to disapprove (R. 417), all without notice to the warrant holders. In the same breath the Court denied to petitioner the opportunity for hearing guaranteed by Section 11(e) by denying without opinion petitioner's motions for leave to adduce new evidence, without any consideration of such evidence or its vital bearing on the case.

So to confiscate or forfeit the rights of United's warrant holders, without due notice and opportunity for hearing, would be contrary to the due process clause of the Fifth Amendment to the Constitution. U. S. C. Const. Amend. 5. In *In re Securities and Exchange Commission*, 142 F. 2d 411 (C. A. 3 1944), affirmed *sub nom. Otis & Co.* v. *S.E.C.*, 323 U. S. 624 (1945), the court said:

> "While it is clear that Section 24(a) gives the Circuit Courts of Appeals jurisdiction to review any order issued by the Commission upon the application of a party aggrieved thereby, it is equally clear that Section 11(e) contemplates that any person affected by the plan shall have the right to be heard as to whether or not the plan is fair and equitable and appropriate to effectuate the provisions of Section 11. In Commonwealth & Southern Corp. v. Securities and Exch. Com'n, 134 F. 2d 747, 753, we indicated that stockholders whose rights were affected by an order of the Commission directing a public utility holding company to change its corporate structure had a right to be heard in that District Court of the United States in which the Commission was seeking to effect its order; that otherwise those stockholders would be deprived of property without due process of law." (P. 422 of 142 F. 2d.)

For some of these and other reasons it has been held by three other courts of appeal, contrary to the decision of the Court below, that a Commission order approving a compulsory plan under Section 11(e) is not reviewable under Section 24(a), *even on petition of a person aggrieved by the plan*, and that such a petition will be dismissed. *Okin* v. *S.E.C.*, 145 F. 2d 206 (C. A. 2 1944), reversed on other grounds 325 U. S. 840 (1945); *Lownsbury* v. *S.E.C.*, 151 F. 2d 217 (C. A. 3 1945), certiorari denied 326 U. S. 782 (1946); *Blatchley* v. *S.E.C.*, 157 F. 2d 898 (C. A. 1 1946); *Goldfine* v. *S.E.C.*, 157 F. 2d 899 (C. A. 1 1946); *Leventritt* v. *S.E.C.*, 178 F. 2d 336 (C. A. 2 1949). *A fortiori*, such an order is not reviewable on petition of stockholders who are benefited, not aggrieved, by it.

The legislative history of the Act supports these decisions. Senator Wheeler was chairman of the Senate Committee on Interstate Commerce, to which the bill which later became the Act was referred. In discussing Section 11(f) of the Act[1] he referred to the "double check" on Section 11 plans by the

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[1] "MR. BORAH:—Mr. President, I desire to ask the Senator from Montana a question.

"On page 50, beginning with line 2, the bill provides as follows:

"'In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submission to the court.'

"I do not exactly understand that language. Does it mean that the court's jurisdiction with reference to the reorganization, or what shall be permitted by decree of the court, is limited; or is it simply recommendatory to the court?

"MR. WHEELER:—We do exactly the same thing at the present time, as I understand, with reference to the Interstate Commerce Commission. A plan for the reorganization of a railroad is supposed to be submitted to the Interstate Commerce Commission for its approval before it is approved by the court. We put this provision in here in practically the same manner, as I recall, as the existing provision with reference to the Interstate Commerce Commission in the case of railroad reorganizations.

* * * * * * * *

"The Senator from Indiana [MR. MINTON] has called my attention to the fact that the provision does not oust the jurisdiction of the court at all, because the court has to approve the plan even though the Commission approves it. In other words there is really a double check upon the plan, and final determination rests as in the past in the courts." 79 Cong. Rec. 8845 (June 7, 1935).

Commission and the enforcing district court. In the *Okin* case the court said:

> "Of further significance is the legislative history of the Act, evincing a congressional intent that the relationship of the Securities and Exchange Commission and the district court provided for in § 11 should be 'exactly' the same as that of the Interstate Commerce Commission and the district court in railroad reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. A. § 205.[4] A review provision in § 77, which provides for equitable relief from any 'order of the Interstate Commerce Commission' in accordance with the usual review of orders of that commission before a statutory three-judge court, 28 U. S. C. A. § 47, has been held inapplicable to a Commission order approving a plan of reorganization, which was, of course, subject to further approval by the district court. Chicago & N.W.R. Co. v. United States, D. C. N. D. Ill., 52 F. Supp. 65, affirmed 320 U. S. 718, 64 S. Ct. 369. Even without the statement in the legislative debates, the two situations would have appeared so closely comparable as to make this precedent persuasive."
>
> "[4] Thus, in the course of a debate on the Senate floor, Senator Wheeler made the following statement concerning § 11(f): 'If I am not mistaken about the matter, we employ exactly that procedure in railroad reorganizations at the present time.' 79 Cong. Rec. 8845, 1935. Sec. 11(f) provides for the appointment of the Commission as trustee in a proceeding pending in a court of the United States and for the submission of a plan by it, not by the holding or subsidiary companies as under § 11(e); but the statement of Senator Wheeler seems equally applicable to the two subsections."
>
> (P. 208 of 145 F. 2d.)

The correctness of the cases holding compulsory plans not reviewable under Section 24(a) of the Act is further supported by the fact that the order of the Commission below was, as to the forfeiture of the warrants, "not operative * * * until an appropriate United States district court shall, upon application thereto, enter an order enforcing said pro-

visions" (R. 80). The Court below in effect rewrote the order by ignoring this proviso (R. 417–9).

It has been the Commission's practice for at least ten years so to condition its orders approving compulsory plans. *Southern Colorado Power Co.*, 14 S. E. C. 115, 141, 728, 730 (1943), enforced (D. Colo. 1944), affirmed *sub nom. Disman* v. *S.E.C.*, 147 F. 2d 679 (C. A. 10 1945), certiorari denied 325 U. S. 863 (1945); *The Laclede Gas Light Co.*, 16 S. E. C. 26, 64 (1944), enforced 57 F. Supp. 997 (E. D. Mo. 1944), affirmed *sub nom. Massachusetts Mutual Life Insurance Co.* v. *S.E.C.*, 151 F. 2d 424 (C. A. 8 1945), certiorari denied 327 U. S. 795 (1946); *The Commonwealth & Southern Corp.*, 19 S. E. C. 713, 715 (1945). The Commission moved successfully in the *Okin* case and the other four cases cited above to dismiss the petitions for review of compulsory plans filed in courts of appeals. The Commission argued below that the Court below had no jurisdiction to approve the forfeiture of the warrants. Such long-continued administrative interpretation of the Act by the Commission which has been entrusted with its enforcement is entitled to great weight. *Boutell* v. *Walling*, 327 U. S. 463, 471 (1946); *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 691–2 (1951).

Even without this feature of the Commission's order, the review provisions of Section 11(e) of the Act make it interlocutory as to the warrant holders, as the court pointed out in the *Okin* case, at p. 207 of 145 F. 2d. It is not final because it was not effective to forfeit the rights of the warrant holders. Only an enforcing district court order can do that, as the Court below admitted (R. 419). It was a mere preliminary, administrative order referring the warrant holders to another tribunal (the enforcing district court where they will be entitled to notice and a hearing), and not a final, appealable order. Such procedural orders are not reviewable under Section 24(a) of the Act. *Phillips* v. *S.E.C.*, 171 F. 2d 180, 182–3 (C. A. 2 1948); *Eastern Utilities Associates* v. *S.E.C.*, 162 F. 2d 385 (C. A. 1 1947); *F.P.C.* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384–5 (1938), and cases there cited.

The Court below distinguished the *Okin*, *Blatchley*, *Goldfine*, and *Leventritt* cases on the ground that in each of them the Commission had applied to a district court to enforce the plan prior to the filing of the petition for review in a court of appeals (R. 410-1). But none of the five cases was decided on this ground and in the *Lownsbury* case the petition for review preceded in time the application to enforce. The Court below attempted to distinguish the *Lownsbury* case on the ground that the Commission's approval was there conditional not only on approval of the plan by an enforcing district court, but also on approval by stockholders (R. 411-2). But there is no less certainty of obtaining stockholder approval of a plan than approval of an enforcing district court. The Commission's approval was no more conditional there than it was in the other four cases.

The Court below stated (R. 413) that the decisions in the *Okin*, *Lownsbury*, *Blatchley*, and *Goldfine* cases have been "rendered nugatory" by the decision of this Court in *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949). But in that case this Court held only that the scope of review under Section 11(e) is the same as under Section 24(a). The case did not involve, and this Court did not discuss, the circumstances under which "exclusive jurisdiction" is obtained by a court. Such an interpretation of the case was expressly rejected in the *Leventritt* case at p. 337 of 178 F. 2d.

The Court below misinterpreted the words "exclusive jurisdiction" in Section 24(a) of the Act. Those words were designed to and do give to a court of appeals where the Commission transcript is filed exclusive jurisdiction over all petitions to review the same Commission order, in whatever circuit such petitions are filed. Petitions filed in other circuits can and should be transferred to that court. *L. J. Marquis & Co.* v. *S.E.C.*, 134 F. 2d 335 (C. A. 2 1943); *L. J. Marquis & Co.* v. *S.E.C.*, 134 F. 2d 822 (C. A. 3 1943); see *American Power & Light Co.* v. *S.E.C.*, 325 U. S. 385, 391 (1945).

As the Court below held, petitions to review do not give the court of appeals jurisdiction to enforce a plan. Neither

do they give to a court of appeals, or take away from the enforcing district court, the district court's "exclusive jurisdiction" expressly conferred by Section 11(e) to approve and enforce, or to disapprove, compulsory plans.

Aside from the case at bar, we have been able to find only one case where a compulsory plan requiring court enforcement to be effective was reviewed by a court of appeals prior to its enforcement by a district court. *L. J. Marquis & Co.* v. *S.E.C.*, 134 F. 2d 822 (C. A. 3 1943). To the extent that the *Marquis* case supports the decision of the Court below, it has been overruled by the later decision of the same court in the *Lownsbury* case. The *Marquis* case is also distinguishable on the grounds pointed out in the *Okin* case:

> "Cases relied on by the petitioner do not seem to us to controvert this conclusion. Thus, in L. J. Marquis & Co. v. Securities and Exchange Commission, 3 Cir., 134 F. 2d 822, the point is not discussed beyond an assertion of exclusive jurisdiction in a single circuit court—a view we had already followed. L. J. Marquis & Co. v. Securities and Exchange Commission, 2 Cir., 134 F. 2d 385; cf. Okin v. Securities and Exchange Commission, 2 Cir., 134 F. 2d 333. We are informed, however, that the plan there did not specifically describe the mode of enforcement contemplated, and the companies requested court enforcement only after the circuit court of appeals had already obtained 'exclusive jurisdiction' under §24(a). Whether or not the issue was squarely presented is not clear, since it came up merely on an application for a stay of the there earlier proceedings, which was denied without opinion." (P. 208 of 145 F. 2d.)

An examination of the record and briefs in the *Marquis* case discloses that the question of the jurisdiction of the court of appeals to review the Commission order was not raised. It is not mentioned in the court's short opinion. As this Court stated in *U.S.* v. *L.A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952);

"Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*."

"' *United States* v. *Moore*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170."

(P. 38 of 344 U. S.)

IV. THE COMPULSORY FEATURES OF UNITED'S PLAN ARE NOT REVIEWABLE BY TWO COURTS, BUT EITHER ARE SEVERABLE FROM THE VOLUNTARY FEATURES OR CONFER EXCLUSIVE JURISDICTION OVER THE ENTIRE PLAN ON AN ENFORCING DISTRICT COURT.

On the subject of the respective duties of a reviewing court of appeals and an enforcing district court, the Court below stated:

"It should be observed that a court of appeals has no power to enforce a plan of compliance; when it has affirmed or modified a Commission order of approval, the Commission may then apply to a district court to obtain enforcement. In that event, the district court has no function except to enforce, since affirmance by the court of appeals necessarily held the plan necessary to effectuate the provisions of § 11(b) and fair and equitable to the persons affected thereby, and its ruling is res judicata as to those questions." (R. 417.)

* * * * * * *

"Our conclusion is that the Commission did not intend to, and did not, qualify or make contingent its approval of the proposed disposition of the option warrants but merely recognized that district court enforcement probably would be necessary to eliminate them." (R. 419.)

The quoted conclusions of the Court lead to one of two results.

aggrieved by them, and without notice to those who are so aggrieved,

The first possibility is that Congress provided for review of compulsory plans by a court of appeals whose decision is not final because ineffective to consummate the plan by "eliminating" the warrants. That feature of the plan and order would therefore now have to be remanded to the Commission, which would start all over again on the same record in an enforcing district court. Yet that court would have no judicial function whatever. It would merely act as a rubber stamp to sign the order enforcing the plan, and [redacted] it would have to do so even though, if left to its own devices, it might refuse enforcement because it found merit in objections to the plan voiced at the purposeless hearing it would be required to hold after the equally purposeless gesture of notice to the warrant holders.

The second possibility is that the same feature of the plan which was approved by the Court below would again be reviewed by the enforcing district court. This seems not unlikely because it is difficult to agree with the statement of the Court below that its decision is *res judicata* in the light of the cases holding that doctrine inapplicable where the parties in the two separate proceedings are not the same. *Textile Machine Works* v. *Louis Hirsch Textile Machine, Inc.*, 13 F. Supp. 476, 482 (S. D. N. Y. 1936), reversed on other grounds 87 F. 2d 702 (C. A. 2 1937), affirmed 302 U. S. 490 (1938); *Gordon Johnson Co.* v. *Hunt*, 102 F. Supp. 1008, 1010–1 (N. D. Ohio 1952).[2] None of the warrant holders were given the notice of the proceeding below to which Section 11(e) of the Act entitles them, and the holders of 68% of the warrants were not parties to it. The district court might therefore conclude that it was free to decide that the plan is unfair or unnecessary, or both, and refuse to enforce it, notwithstanding its approval by the Court below.

The Act can and, it is submitted, should be so construed as to avoid either horn of this dilemma. This may be done by treating the compulsory features of the plan as severable and reviewable in the first instance only by the enforcing district

[2] It is submitted that the contrary decision in *Application of Securities and Exchange Commission*, 50 F. Supp. 965, 966 (D. Del. 1943), is erroneous.

court. As the Commission pointed out on page 23 of its answer to the petition for a writ of certiorari in this case, normally where there is a contest a "plan is split into two or more steps and each step successively approved by a separate order", and the result here contended for is achieved by this means. Piecemeal plans are proper and have been approved by the Commission time and time again without challenge in the courts. They were expressly upheld in *Phillips* v. *S.E.C.*, 185 F. 2d 746, 750 (App. D. C. 1950), quoting with approval from *Phillips* v. *S.E.C.*, 156 F. 2d 606, 609 (C. A. 2 1946):

> "There is nothing in the Act which says every order must be an all-or-none one, and that strict compliance with the ultimate objective must be forced at once—as if that were even remotely possible, in view of the intricacy of these huge financial structures."

It is submitted that, for the foregoing reasons, the enforcing district court has exclusive jurisdiction over the compulsory features of United's plan. It is further submitted that, if this Court should not consider United's plan and the Commission's order thus severable, then the district court has exclusive jurisdiction over the entire plan and order.

But the question of the jurisdiction of the Court below over the "voluntary" features of a Section 11(e) plan (such as those by which the petitioning stockholders below claimed to be aggrieved) is not before this Court in this case. It need not be considered or decided unless and until it is properly raised by an aggrieved party in some other case. Due to the Commission's practice of splitting plans into separate steps approved by separate orders, the question probably never will reach the courts.

V. Conclusion.

For the foregoing reasons it is submitted that the judgment of the Court below should be reversed in so far as it held that that Court had jurisdiction to approve of the for-

feiture of United's warrants and to affirm the portion of the Commission's order approving of such forfeiture, with instructions to remand to the Commission, for appropriate further proceedings, the portions of the plan and the Commission order dealing with [redacted] the warrants.

Respectfully submitted,

November 6, 1953

HENRY S. DRINKER,
THOMAS REATH,
JOHN MULFORD,
117 South 17th Street,
Philadelphia 3, Pa.

M. QUINN SHAUGHNESSY,
715 Cafritz Building,
Washington 6, D. C.
Counsel for Petitioners.